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537402—43

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 84

DIXIE PINE PRODUCTS COMPANY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 51) is reported at 45 B. T. A. 286. The opinion of the Circuit Court of Appeals (R. 61–64) is reported at 134 F. 2d 273.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 5, 1943 (R. 64). The petition for writ of certiorari was filed June 5, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a taxpayer on the accrual basis may deduct as an accrued tax under Section 23 (c) of the Revenue Act of 1936 an amount assessed against it for state gasoline tax for which it was currently denying any liability.

STATUTE INVOLVED

The pertinent statute will be found in the Appendix, *infra*.

STATEMENT

The taxpayer, a corporation, was engaged in the business of extracting turpentine, pine oil, and resin from stumps and other waste wood (R. 47). It kept its books and filed its income tax returns on the accrual basis of accounting (R. 50).

The Mississippi state gasoline tax statute defined "gasoline" to "include all liquid fuels which are used or usable in propelling motor vehicles * * * including liquids ordinarily, practically and commercially usable in internal combustion engines for the generation of power, and all distillates of, and condensates from petroleum, natural gas, coal, coal tar, vegetable ferments, and other products so usable and received in this state," meeting specified tests. General Laws of Mississippi (1936), c. 162, Sections 5 (a) and 8 (a). A quantity of solvent made from petroleum products was used by the taxpayer in its extraction process. In 1936, the Assistant Motor Ve-

hicle Commissioner of Mississippi, contending that this solvent was usable in the operation of motor vehicles, assessed the tax on the solvent received and used by the taxpayer in that year. (R. 47–48.) The taxpayer paid the tax, as did other companies engaged in a similar business (R. 48).

On August 6, 1936, however, the taxpayer filed a bill of complaint in the State Chancery Court, alleging that the nature of the solvent and the use to which it was put did not fall within the taxing statute, and asking for temporary and permanent injunctions against the future collection of the tax. A demurrer to the bill was sustained on August 15, 1936. (R. 48.) The taxpayer thereupon appealed to the Supreme Court of Mississippi, and on January 25, 1937, that court reversed the decree of the lower court in sustaining the demurrer and remanded the cause. *Dixie Pine Products Co.* v. *Dyer,* 178 Miss. 227, 172 So. 145.

The taxpayer, after the date of this decision, denied that it owed, and ceased to pay, gasoline tax on the solvent used by it. The Motor Vehicle Commissioner continued to assess and demand payment of the tax throughout 1937. He advised the taxpayer then that he was uncertain whether the tax was due for the use of the solvent and that the determination of liability was then dependent upon the final decision of the court. Other concerns using solvent in a similar process, with one

exception, paid the gasoline tax assessed in 1937. (R. 49.)

On May 15, 1937, the Motor Vehicle Commissioner filed an answer to the taxpayer's bill of complaint. The taxpayer's attorneys, by letter dated in December 1937, directed that entries be made in its books accruing the gasoline tax. The entries were made, as of December 31, 1937, at some time between January 1, and March 15, 1938, in the course of closing and auditing the 1937 books. The amount of the tax thus accrued for 1937 was $20,839.38, and this amount was deducted by taxpayer on its income tax return for 1937. On December 21, 1938, the Mississippi Chancery Court, upon an agreed statement of facts, rendered its final decree perpetually enjoining the Motor Vehicle Commissioner from assessing gasoline tax on the solvent used by taxpayer. The State Supreme Court affirmed on October 23, 1939. *Dyer* v. *Dixie Pine Products Co.*, 191 So. 429. Taxpayer never paid the taxes. The amount of $20,839.38 was reported as income in taxpayer's 1938 tax return. (R. 49–50.)

The Commissioner determined that the 1937 taxes were not deductible from income. The Board of Tax Appeals sustained the determination (R. 51), and its decision was in turn affirmed by the court below (R. 61–64).

ARGUMENT

The court below correctly held that the taxpayer was not entitled to deduct in 1937 the Mississippi gasoline taxes which it was then vigorously contesting and which it in fact never paid. The decision is in accord with the general rule relating to the accrual system of accounting that a taxpayer may not accrue a contested or other contingent liability. *Lucas* v. *American Code Co.*, 280 U. S. 445, 451; *Pharr & Sons* v. *Commissioners*, 56 F. 2d 832 (C. C. A. 5th); *Commissioner* v. *Southeastern Express Co.*, 56 F. 2d 600 (C. C. A. 5th); *Kentucky & Indiana T. R. Co.* v. *Commissioner*, 54 F. 2d 738 (C. C. A. 6th); *H. Liebes & Co.* v. *Commissioner*, 90 F. 2d 932 (C. C. A. 9th); cf. *Brown* v. *Helvering*, 291 U. S. 193; *United States* v. *Anderson*, 269 U. S. 422, 441.

There are several cases, however, which appear to be broadly inconsistent with the general rule, principally *J. A. Dougherty's Sons* v. *Commissioner*, 121 F. 2d 700 (C. C. A. 3d), and *Davies, Estate* v. *Commissioner*, 126 F. 2d 294 (C. C. A. 6th). The Government sought further review in the *Davies* case but this Court denied certiorari. 317 U. S. 640. There would seem to be less occasion for certiorari here, where the Circuit Court of Appeals adhered to established principles, than in the *Davies* case where the result was contrary to those principles.

CONCLUSION

The decision below is correct. The petition should be denied.

Respectfully submitted,

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JULY 1943.

APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(c) *Taxes Generally.*—Taxes paid or accrued within the taxable year, * * * [with exceptions not material here]

* * * * *

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. * * *

SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. * * *

SEC. 43. PERIOD FOR WHICH DEDUCTIONS AND CREDITS TAKEN.

The deductions and credits (other than the dividends paid credit provided in section 27) provided for in this title shall be taken for the taxable year in which "paid or accrued" or "paid or incurred", dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period. * * *

SEC. 48. DEFINITIONS.

When used in this title—

* * * * * *

(c) *Paid, Incurred, Accrued.*—The terms "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under this Part.

* * * * * *

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